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NO. 85-622
IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1985

FRANK PIETRONIRO, Vice-President,
MARY PIETRONIRO, Pres.,
PIET CORPORATION

Petitioners,

vs.

BOROUGH OF OCEANPORT, CLEMENT SOMMERS, ELWOOD BAXTER, LOUIS SYLVAIN, GEORGE BARRETT, NICHOLAS LEONE

Respondents

REPLY BRIEF OF PETITIONERS IN RESPONSE TO RESPONDENTS' BRIEF IN OPPOSIITON TO THE PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

DID THE THIRD CIRCUIT CREATE A CONFLICT WITH THE FOURTH CIRCUIT BY USING THE RULE AND RATIONALE OF AMERICAN DRY CLEANERS VS. U.S. DEPARTMENT OF TRANSPORTATION (a case where services were adequate and and the municipality held no land for disposal) INSTEAD OF REVIEW CONSIDERATIONS DISTINCTLY ESTABLISHED AND DIFFERENTIATED BY THE FOURTH CIRCUIT IN M. CROCKIN CO. VS. PORTSMOUTH REDEVELOPMENT AUTH. FOR PETITIONERS' CASE (in cases where services are inadequate and the municipality holds land for disposal having the ability to convey it).

POINT ONE: THE RECENT FOURTH CIRCUIT CASE OF AMERICAN DRY CLEANERS V. U.S. DEPT. OF TRANSPORTATION, INTERPRETING THE CASE OF M. CROCKIN CO. V. PORTSMOUTH REDEVELOPMENT AUTHORITY, IN PETITIONER'S FAVOR, ESTABLISHES A CONFLICT WITH THE THIRD CIRCUIT DECISION IN THIS MATTER.

ARGUMENT

In American Dry Cleaners v. U.S. Department of Transportation, 722 F.2d. 70 (4th Cir. 1983), a business displacee conceded that defendants rendered adequate relocation services. He alleged that, even so, defendants still had the duty to obtain for him an adequate replacement location, even though the adequate services he received failed to uncover same. Only in this limited fact situation did the 4th Circuit rule that this was not the case. The 4th Circuit distinguished this case in two ways from Crockin-Piet situations, making its ruling inapplicable in American Dry Cleaners, where:

a.) The municipality acquires land in the renewal and fails to dispose of parcels in the advisory program under the 51% residential-49 % commercial Congressional ratio

for development; (RATTI PARCELS) and where

b.The Plaintiffs, as in the Crockin-Piet cases, testify that the relocation advisory services they receive are inadequate and unsatisfactory. (See testimony of Bataas and Pietroniro, Appendix, pp. A1-A4)

The Fourth Circuit stated:

> *(Distinguishing the American Dry Cleaners decision)*
>
> *..In the Crockin case, the authority owned the replacement location and had the ability to convey it..Here the government does not own a replacement location and has nothing to convey..The legality of the program in Crockin (where the authority held land for disposal) should be determined in light of allegations that..the parcel should have been made available.." Dry Cleaners, supra, 722 F.2d. at 73-74.*

An examination of the Third Circuit decision here demonstrates that the rationale in the American Dry Cleaners decision (where the authority owned no land to dispose of) has been improperly applied to Crockin-Piet facts (where the Boro owned RATTI LAND for disposal), creating a distinct conflict between the Third and the

Fourth Circuits. (See decision of the 3d. Circuit, Appendix within original petition pp. A22-A23, A12) Such warrants review upon certiorari to settle the above principles for all business displacees in this country.

The Fourth Circuit, in Crockin, supra, 437 F.2d. 784 (4th Cir. 1971) has consistently held that, where services are alleged inadequate and where the defendants refuse to extend purchase options to displacees, that such presents a fact situation as to whether or not advisory service laws have been breached:

> *"..Crockin should have the opportunity to prove that the Authority failed to comply with the regulations ..and plan..determined in light of the allegation the only feasible assistance was to make the parcel available..Crockin, supra, at p. 785, American Dry Cleaners, supra at p. 73.. (EMPHASIS ADDED)..... Crockin alleged (defendants) realized he needed that assistance, had the ability to grant it, and that such assistance was compatible with the use for which the parcel was designated.."*

The foregoing consideration apply to renewal tracts, such as the RATTI PARCELS,

acquired in the renewal by the Boro. (See testimony at Appendix, pp. A4-A7).

Like the Crockin plaintiff, Piet's argument as to the appropriateness of a proposed commercial use on a RATTI PARCEL was a matter of fact for district court resolution. The issue was that of Piet's proposed use versus the municipality's proposed use, of which the municipality's was none since the RATTI PARCELS are vacant to this day. (EMPHASIS ADDED) Piet aptly characterized this at trial as the municipality's refusal to extend relocation opportunities. (Testimony, App. p.A9)

Conflictingly, the Third Circuit, on the above issue of use appropriateness, has ruled as a matter of law that the question is now one governed totally by initial zoning, which effectively obliterates national goals and sanctions the preferential treatment accorded the similarly displaced professional commercial operators extended preferential purchase contracts in the RATTI TRACT, without articulating standards for review of same.

(Opinion of 3d. Cir., App. p. A22-A23,A12)

This conflicts with Crockin, where the 4th Circuit struck down preferential treatment:

> *"Plaintiff's assertion that local redevelopment authority denied it equal protection..because other owners..were permitted to acquire renewal parcels..but Plaintiff was not permitted to acquire a parcel presented a question to be determined upon the merits.." Crockin v. Portsmouth, 437 F.2d. 785 (4th Cir. 1971)*

In Crockin, the Court further stated that the Plaintiff was entitled to attack either the plan or services given under the regulations, contrary to respondents' contentions. THE OCEANPORT RELOCATION PLAN, cited in the Appendix hereto, furthermore, contained the wording within the statutory regulations as the Boro's affirmative obligation. (Appendix herein at pp. A7-A9)

In the Piet Corp. case, defendant Leone admitted that he did not provide proper federal information upon referrals. Both Pietroniro and Bataas, another licensee, also testified this was the case. (App.

pp.A1-A4 Advisory assistance to comparables was lacking. Likewise, Pietroniro testified that defendants refused all of his overtures for a RATTI PARCEL similar to the parcel allowed the professional commercial operators, and this the defendants freely admitted in this case. (Appendix, p. A6-A7) Such admitted denials of relocation assistance are supported by sufficient evidence in this record. Piet further testified he was not aware of the KINCAID TRACT or Batass' negotiations upon it until after it was sold to the Track and he was informed of such by Councilman Dellera. (App. testimony at pp. A3-A4).

Similarly, the remaining contentions of the Respondents are without merit. To the contrary, Piet could not have applied for a variance to the Board of Adjustment nor bid upon a RATTI PARCEL. This is because the LPA defendants acknowledged they refused to make any RATTI PARCELS available to Piet as a procedural condition subsequent to any further actions on

the Plaintiffs' part. Most signifigantly, this was reinforced by the testimony of Pietroniro, Baxter and Sommers in the Appendix at pp. A4-A7)

The variance given to the select professional commercial operators underscores the procedural disparity, underscoring this point fully:

A. The LPA must first enter into a purchase contract with the displacee. The Shell Station was allowed to remain in the RATTI AREA with the select class first extended a purchase option upon a residential lot subject then to the application for a variance.

B. The displacees then applied for a variance to the Adjustment Board. The area composed some commercial property occupied by the Shell station, which was also accorded a variance. (Testimony of Pietroniro, Rec. A741-744, App. p.A9-A10)

C. The LPA then extended preferen-

tial recommendations to the Board for the select class asking the Board to approve commercial development on the parcel:

> *PIETRONIRO: "..It was through the Zoning Board of Oceanport with the recommendation of the Mayor and Council these parcels be designated commercial..The commercial property was the Shell station and the doctor's office..(both) given a variance. (Record, App. A741-742)*

D. The Board then concurred and left the actual granting of the variance to the LPA-Council defendants, who then brought their initial recommendations, given through the relocation advisory assistance program, to full fruition:

> *Q. Who..did they get the variance from..the Town Council? A. Yes.. THE COURT: Is counsel prepared to stipulate it came through the Board of Adjustment? COUNSEL (ALL): So stipulated." Rec. A741)*

Without an essential beginning purchase contract on a parcel, Piet was denied equal protection and proper assistance, just as the Crockin plaintiff was. This was characterized at oral argument at the Third Circuit by counsel, regarding the vacant RATTI parcels:

"..You can't apply for a variance if the governing board won't make a parcel available. You are putting the cart before the horse.. Baxter and Sommers admit that Piet.. made many overtures for this property and that they were all unfavorably met..Why couldn't the..license owners, who needed the help so much more--why couldn't they have the same opportunity on this vacant land to at least bid on a parcel and submit a plan for a variance to the Board of Adjustment after they entered into a contract to buy the parcel.."

They had the particular piece of land, knew we (the licensees) needed the assistance, they had the ability to grant it!!And yet there were these people with licenses that desperately needed a piece to relocate that were just shut off from the opportunity..

"If they parceled off Parcel 6 and allowed the doctor to buy it subject to the obtaining of a later variance, they could have easily done it on the vacant land.."(Oral argument; U.S. Third Circuit, at pp. 32,35)

CONCLUSION

For all of the foregoing reasons, a Writ of Certiorari should issue.

RESPECTFULLY,

Cynthia Liebling

CYNTHIA LIEBLING

Attorney for the PETITIONERS.

TESTIMONY REGARDING THE KINCADE PROPERTY AND STALDER AND ARNOLD SITES DEMONSTRATING CURRENT AND CONTINUING INFORMATION UNDER FEDERAL LAW WAS NOT PROVIDED TO THE PETITIONERS HEREIN

LEONE:

Q. Did you ever provide any.. of the businesses with any type of information such as costs of renovation, square footage involving the properties, tidal conditions..?

A. To the best of my knowledge I did not and it is not required as a part of our assistance." (A2202 Record, Appendix)

PIETRONIRO:

A. The LPA, which was the Mayor and Councilmen, pointed to a piece of property and said go locate your business there. We have to go all over to find out..(Leone) He was the relocation officer..supposed to assist me and find out the costs and what it entails to fix it..That was the job of the LPA to investigate and say.. it is going to cost you $50,000 to improve this property..We did the best we could..We got no cooperation..We were put out on the streets.."(Record App. A872-873, A1031, A1107)

PIETRONIRO:
A. All they did, all their relocation efforts were--'There's a piece of property. There is a piece of property..Do you want the two pieces'(referring to the Stalder and Arnold referrals)..They would not assist you on the cost plus the moving..I had to go ahead and try to find out myself..(Record, App. A1220)

BATAAS:
A.I did a lengthy investigation on the KINCADE PROPERTY..I researched that property and it took me approximately 1 1/2 years by foot work by myself (EMPHASIS ADDED). I notified the Mayor and these three members of the Council I planned on moving my bar there..I did most of the research on my own.." (Record, Appendix A686-687, A712)

BATAAS:
Q. You had the same opportunity to purchase the KINCADE PROPERTY, isn't that a fact? A. Wrong. Q. Why didn't you have the same opportunity when you started looking at the KINCADE PROPERTY to buy it? A. I answered that question before sir. Q. Be-

cause it took you l l/2 years to determine who owned the property. Is that your testimony? Is it or isn't it? A. Yes, it is. (Record, Appendix A715)

PIETRONIRO: (regarding the KINCADE PROPERTY) A. Mr. Sylvain-- Mr. Leone emphatically lied about the Kincaid Property. Q. What property did they refer you to that was not available? A. They referred me after it was sold.. the KINCAID PROPERTY. (Record A1220)

A. I testified that I knew the property after the sale because Mr. Bataas, that was displaced here had meetings with the LPA to move his liquor license there.

Q. But you knew Mr. Bataas was engaged in the discussions with the owner of the KINCADE PROPERTY. What did you think they were talking about?

*A. I FOUND OUT AFTER. (EMPHASIS ADDED)*** *Record Appendix A1221-1222)*

Q. So you knew about its (KINCADE) avail-

**/ *This testimony shows that Pietroniro was not independently aware of the Kincade tract prior to its sale, contrary to the appellants' contentions in their brief.*

ability before it was sold to Monmouth Park, didn't you?

*A. No sir..I didn't know that the property was for sale until after it was bought by Monmouth Park..I knew that he (Bataas) had been negotiating on it, then it was sold, and I found out about it after from Councilman Dellera.*** (Record, Appendix A.1222)

TESTIMONY REGARDING THE RATTI PARCELS

PIETRONIRO: On..the Ratti Property, any zones in that designated for the relocation of the businesses? A. No..this is approximately ten acres of ground that has been vacant for 8-9..7-8 years. (Record, Appendix A741-742)

Q..Who had title to this ground..(referring to the Ratti area) A. All that property, except possibly the Turf Bar.. there at the old location about 100 yards over there..some of it was still owned by the businessmen and some was acquired by the LPA..Q. So the LPA owned

some land in there, correct? A. Yes. (A854)

Q. Were there any other parcels..that had been acquired in the condemnation, offered for relocation by the Borough for a similar price of around $10,000..were any other parcels offered for relocation?

A. There was no parcel offered to anyone except the doctor and the dentist in the affected area where everything was torn down..(A858)

Q. What parcels..did you try to relocate on using your owninitiative? A. I tried very strenuously to obtain a small piece of ground where the RATTI property was..
(A859)
..The fact that I was located here and the Shell station was over here..the gas station stayed (by variance in the Ratti area) but I was evicted, I begged at the time for a piece of property over in here..(referring to the Ratti area).. I told him that I had a license to sell my wares the same as the gas line to sell

gasoline..(EMPHASIS ADDED, Appendix, Rec. A741, 742, 743)

TESTIMONY REGARDING THE DEFENDANTS' ADMITTED DENIALS OF PURCHASE OPTIONS UPON RATTI PARCELS TO PETITIONER

*SOMMERS' AFFIDAVIT IN EVIDENCE, Pl. Exh.41: (EXCERPT) ..While principals of the Piet Corporation have often expressed interest in that particular piece of property.. overtures have been unfavorably received by the governing body of the Borough of Oceanport.." (A753-754)***/*

Q. What property was he alluding to in the last statement, of your own personal knowledge? A. Pietroniro: The opposite corner to where I was called the RATTI PROPERTY": (Record, Appendix A754)

BAXTER'S AFFIDAVIT, Pl. Exh. 31:

"I have reviewed the affidavit of Joseph Boynton..in particular his statement that I promised to sell land immediately across the street from the present location of the Colonial Bar to the Piet Corp. sub-

****/ The LPA members were also Council members in Oceanport.*

ject to the obtaining of a variance..

I recall that meeting and at no time did I make such a promise.. Moreover, Piet Corp. since that meeting has periodically expressed interest in the piece of property and those requests have been unfavorably reviewed by myself and my fellow members on the Oceanport Borough Council.."(Record, Appendix A288-289)

EXCERPTS FROM OCEANPORT'S RELOCATION PLAN EMBODYING THE STATUTORY LANGUAGE OF OBLIGATIONS IMPOSED ON DEFENDANTS UNDER THE HOUSING ACT AND UNIFORM RELOCATION ASSISTANCE ACT.

TESTIMONY OF BOYNTON:

..This is the application for first year funding by the Borough to HUD for NDP.. (Defense Exh. 143)..Q. Does it not say--

"ADVISE AND ASSIST COMMERCIAL TENANTS IN RELOCATION MATTERS AND INSURE MAXIMUM OPPORTUNITY FOR THEIR SATISFACTORY RELOCATION"?

"IT IS AS IMPORTANT TO THE BUSINESSES BEING FORCED TO MOVE AS IT IS TO THE BORO'S OVERALL RENEWAL PROGRAM THAT THE BOROUGH ASSUME THIS RESPONSIBILITY AND ASSIST THE RELOCATIONS OF BUSINESS IN EVERY WAY POSSIBLE(Emphasis)" A. Yes, it does. (Rec. Appendix A.1688-1689)

..Q. Does it not state..

THE BOROUGH SHALL PERIODICALLY EVALUATE THE RELOCATION ASSISTANCE ADVISORY PROGRAM TO DETERMINE ITS EFFECTIVENESS..ALL FACTORS LISTED WITHIN Chapter 2, Sec. 2.20a of the RELOCATION HANDBOOK OF HUD 1371.1 WILL BE REVIEWED IN CONSIDERING THE QUALITY AND THE QUANTITY OF THE SERVICES RENDERED.." A. Yes.

Q. Based upon that representation to HUD, were you reasonably satisfied that you would not be put out of business.. that relocation opportunities would be complied with..?

A. Yes. At the beginning, yes.(A1690-A1694)

Q. Did you have cause to look at the 2d year book (application) DB-142?

Q. Uses to be permitted ..planning criteria.. standards used to determine the following:

"SUPPORTING RETAIL USES WHICH SERVE THE CONVENIENCE NEEDS OF THE NEIGHBORHOOD WILL BE PERMITTED.. IT IS THE INTENT OF THE PLAN TO CONCENTRATE THE NEIGHBORHOOD COMMERCIAL AROUND THE NEUCLEUS OF EXISTING USES WHICH WILL REMAIN" (referring to the gas station and professional commercial displacees allowed to remain and relocate in the RATTI AREA).. Sec. 501: Commercial development is not planned for this active (2d) year, but subsequent planning will permit definitive commercial areas to be identified..Specific design controls will be presented with the land disposition supplement.."(A1694)@@/

A. I felt that they were telling HUD they were going to put the commercial back where it was..We were the only commercial area in Oceanport, so to speak. (A1694)@@/

TESTIMONY REGARDING THE UNAVAILABILITY OF THE NEW COMMERCIAL ZONE AND THE DEFENDANTS' REFUSALS TO DISPOSE OF RATTI PARCELS UNDER THE 51%-49% NATIONAL GOALS PROGRAM OF CONGRESS.

PIETRONIRO:
"...On the transcript .. that 51% of the property could be residential and the other 49% (in the RATTI TRACT) could be commercial..I felt from what they had said that I was safe, but I was concerned with everyone else that any other businessman that wanted to relocate in that area, 49% being commercial, there would be enough room for everyone..(Record, App. A1283) ..It (the new commercial zone after renewal) is 90% owned by Monmouth Park Track. It was given and changed. In this percen-

@@/With the onset of renewal, the new commercial zone was unavailable for relocation because it was owned by two private vested interests. The RATTI PARCELS the municipality refused to dispose of left no relocation alternatives at all in the Borough for the displaced licensees, with the defendants failing to adhere to these provisions.

tage the race track owned they said they were going to build a shopping center that would accommodate some of the displacees.. to date they never built anything.." (Record, App. A966)

"..The property ..that I owned.. it was commercial property..I believed the politicians..they told me that not one man would be put out on the street if you let us take this and change it to residential.. but after they got the residential.. they didn't want us anymore because they said we were commercial..whereas it was our property to start out with.. It was all commercial property there..(referring to the renewal RATTI TRACT before the project was put through). (Record, app. A966, 1283, 967)

" (In the Ratti Area after renewal).. The commercial property was the Shell station..given a variance..and the doctor.. given a variance.. from the Town Council.. through the Board of Adjustment ..with recommendations of the Mayor and Council.." (Record, Appendix A740-741)